D4

U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: SRC 02 253 51365 Office: Texas Service Center Date: JAN 22 2003

IN RE: Petitioner: [redacted]
Beneficiarie

Petition: Petition for a Nonimmigrant Worker Pursuant to § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

PUBLIC COPY

IN BEHALF OF PETITIONER: Self-represented

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petition indicates that the petitioner seeks to employ the beneficiaries as chaperons for her children for nine months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made. The director determined that the petitioner has not presented evidence to justify why the beneficiaries were unnamed on the petition. The director also determined that the duties to be performed by the beneficiaries are not of a seasonal or temporary nature. Further, the director determined that the Service is unable to determine the address where the beneficiaries will be employed.

The regulation at 8 C.F.R. 214.2(h)(2)(iii) states in pertinent part that:

> **Named beneficiaries.** Nonagricultural petitions must include the names of beneficiaries and other required information at the time of filing. Under the H-2B classification, exceptions may be granted in emergent situations involving multiple beneficiaries at the discretion of the director, and in special filing situations as determined by the Service's Headquarters.

The decision to allow unnamed beneficiaries on an H-2B petition should be based on evidence from the petitioner clearly describing the "emergent situation." In general, the decision to allow unnamed beneficiaries on an H-2B petition should be based on valid business reasons.

In this case, the petitioner has not submitted any evidence establishing an "emergent situation" that would allow the Service to waive the names of the temporary nonagricultural workers at the time of filing. Moreover, the regulations do not provide for the acceptance of nonagricultural petitions that do not include the names of the beneficiaries and other required information at the time of filing. For this reason, the petition may not be approved.

This petition may not be approved for another reason. Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

> an alien...having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to

> graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. See 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. 214.2(h)(6)(ii)(B).

The petition indicates that the employment is seasonal and that the temporary need recurs annually.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be seasonal, the petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

> Accompanies minors on trips to educational institutions, public functions, or recreational activities to provide adult supervision in absence of parents. Follows parents' instructions regarding minors' activities and imposes limitations and restrictions to ensure their safety, well-being and conformance to specified behavior standards. May plan free-time activities. May arrange for transportation, tickets, and meals.

The director determined in her decision that the duties of the offered position were not temporary. However, it is the petitioner's need for the services which is controlling. Therefore, it must be shown that the petitioner's need for the beneficiary's services is temporary.

The petition indicates that the dates of intended employment are from September 1, 2002 until June 30, 2003. The petition also indicates that the beneficiary will work in Tulsa, Oklahoma. The Form ETA 750 indicates that the dates of intended employment are from August 1, 2002 until June 30, 2003. Form ETA 750 indicates that the beneficiary will work in Morganville, New Jersey.

The two applications filed by the petitioner have tied the period of employment into ten months. However, the services to be rendered cannot be classified as seasonal work, as the petitioner's need for the services or labor to be provided have not been shown to be traditionally tied to a season of the year by an event or pattern. Further, the petitioner has not provided evidence to show that the need for the beneficiary's services will not continue the following school year. Consequently, the employment cannot be considered a seasonal need and for only a temporary period. In addition, the petitioner has not identified where the beneficiary will be employed. For these additional reasons, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The decision of the director is affirmed. The petition is denied.